

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

PHILLIP DINOVO,)	
)	
Petitioner,)	
)	
v.)	Nos. 4:11-CR-21-HSM-SKL-1
)	4:16-CV-96-HSM
UNITED STATES OF AMERICA,)	
)	
Respondent.)	

MEMORANDUM OPINION

Before the Court is the United States' motion to deny and dismiss Petitioner's motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255 [Doc. 41]. Petitioner submitted the relevant § 2255 petition on September 26, 2016 [Doc. 37].¹ In it, he challenges his enhancement under Section 2K2.1 of the United States Sentencing Guidelines based on *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual provision of the Armed Career Criminal Act, 18 U.S.C. § 924(e), was unconstitutionally vague [*Id.* (suggesting that his

¹ Petitioner originally submitted a pro se petition seeking collateral relief on March 11, 2013 [Doc. 23]. The Clerk's Office assigned the original petition the following civil case: E.D. Tenn. Case No. 4:13-cv-20-HSM. This Court denied those claims on the merits in a Memorandum Opinion and Judgment Order entered on March 2, 2016 [Docs. 30, 31]. Petitioner appealed and, incident to that appeal, requested a certificate of appealability [Doc. 33]. On February 11, 2016, this Court appointed Federal Defender Services of Eastern Tennessee (FDSET) for the limited purpose of determining whether or not Petitioner was entitled to collateral relief based on *Johnson v. United States*, 135 S. Ct. 2551 (2015). Consistent with that appointment, FDSET filed a request with the Sixth Circuit to expand Petitioner's pro se request for a certificate of appealability to include a claim based on *Johnson* or, in alternative, to remand the case to this Court for consideration of a *Johnson*-based request for relief [Doc. 36]. The Sixth Circuit opted for the latter, remanding the case for this court to consider whether Petitioner was entitled to relief based on *Johnson* [*Id.*]. The Clerk's Office assigned the limited issue on remand the following civil case: E.D. Tenn. Case No. 4:16-cv-96-HSM. Consistent with the Sixth Circuit's instructions, this Court stayed the action pending *Beckles v. United States*, 137 S. Ct. 886 (2017) [Doc. 38].

sentence is no longer valid because the residual clause in Section 4B1.2 is equally vague)].² Consistent with the Sixth Circuit’s instruction, this Court stayed the action pending *Beckles v. United States*, 137 S.Ct. 886 (2017).

On March 6, 2017, the Supreme Court decided *Beckles* and held that the United States Sentencing Guidelines are “not amenable to vagueness challenges.” *Id.* at 894. Two weeks later, this Court entered an Order (1) explaining that *Beckles* necessarily meant that “*Johnson* . . . does not undermine sentences based on Guideline enhancements;” (2) instructing the parties to “file any motion that they want[ed] the Court to consider in conjunction with, or prior to, ruling on [the instant] petition[] on or before April 1, 2017;” and (3) requiring that responsive pleadings be filed on or before April 15, 2017 [Doc. 40].

² The ACCA mandates a fifteen-year sentence for any felon who unlawfully possesses a firearm after having sustained three prior convictions “for a violent felony or a serious drug offense, or both, committed on occasions different from one another.” 18 U.S.C. § 924(e)(1). The statute defines “violent felony” as “any crime punishable by imprisonment for a term exceeding one year” that (1) “has as an element the use, attempted use, or threatened use of physical force against the person of another” (the “use-of-physical-force clause”); (2) “is burglary, arson, or extortion, involves the use of explosives” (the “enumerated-offense clause”); or (3) “otherwise involves conduct that presents a serious potential risk of physical injury to another” (the “residual clause”). 18 U.S.C. § 924(e)(2)(B). It was this third clause—the residual clause—that the Supreme Court deemed unconstitutional in *Johnson*. 135 S. Ct. at 2563.

The Guidelines set a general base offense level of fourteen for violating 18 U.S.C. § 922(g). U.S. Sentencing Manual § 2K2.1(a)(6). For offenders with one prior conviction for either a “crime of violence” or “controlled substance offense,” the base offense level increases to twenty. U.S. Sentencing Manual § 2K2.1(a)(4). Offenders with two such convictions face a base offense level of twenty-four. U.S. Sentencing Manual § 2K2.1(a)(2). “Controlled substance offense” is defined as any offense “punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance . . . or the possession of controlled substance . . . with intent to manufacture, import, export, distribute, or dispense.” U.S. Sentencing Manual § 4B1.2(b). “Crime of violence” is defined in an almost identical manner as “violent felony” under the ACCA. *See* U.S. Sentencing Manual § 4B1.2(a) (adopting identical use-of-force and residual clauses and similar enumerated-offense clause).

On March 24, 2017, the United States filed the instant motion to dismiss Petitioner's *Johnson*-based challenge to his career offender designation in light of *Beckles* [Doc. 41]. Petitioner has not filed a response and the time for doing so has now passed [Doc. 40]. This Court interprets the absence of a response as a waiver of opposition. *See, e.g., Notredan, LLC v. Old Republic Exch. Facilitator Co.*, 531 F. App'x 567, 569 (6th Cir. 2013) (explaining that failure to respond or otherwise oppose a motion to dismiss operates as both a waiver of opposition to, and an independent basis for granting, the unopposed motion); *see also* E.D. Tenn. L.R. 7.2 ("Failure to respond to a motion may be deemed a waiver of any opposition to the relief sought").

On March 31, 2017, FDSET filed a motion asking to withdraw as appointed counsel under the Standing Order in light of *Beckles* [Doc. 42 (explaining that she cannot further pursue a motion to vacate under *Johnson* according to the limited appointment authorization provided by the Standing Order)]. Also before the Court is a request that it terminate the stay [Doc. 39 (noting that the Sixth Circuit left the Court free to consider terminating the *Beckles*-based stay under appropriate circumstances, either on motion or *sua sponte*)].

I. RESOLUTION OF NON-DISPOSITIVE MOTIONS

Because *Beckles* forecloses any possibility of *Johnson*-based relief, the request to withdraw [Doc. 42] will be **GRANTED** and counsel will be relieved of her duties under the Standing Order. The request to terminate the stay will be [Doc. 39] **GRANTED** because *Beckles* has been decided.

II. DISPOSITIVE MOTION AND § 2255 PETITION

To the extent that Petitioner challenges his career offender designation based on *Johnson*, that argument fails because the Guidelines are not subject to void for vagueness analysis. *Beckles*, 137 S. Ct. 894. Because *Beckles* forecloses *Johnson*-based relief from Petitioner's Guideline

enhancement and because this Court interprets Petitioner's failure to respond to the United States' request for dismissal as a waiver of opposition, the motion to deny and dismiss will be granted.

III. CONCLUSION

For the foregoing reasons and because this Court interprets Petitioner's failure to respond to the United States' request for dismissal as a waiver of opposition, the motion to deny and dismiss [Doc. 41] will be **GRANTED** and Petitioner's § 2255 petition [Doc. 37] will be **DENIED** and **DISMISSED WITH PREJUDICE**. FDSET's motion to withdraw [Doc. 42] and request to lift the stay [Doc. 39] will be **GRANTED**. This Court will **CERTIFY** any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore, this Court will **DENY** Petitioner leave to proceed *in forma pauperis* on appeal. *See* Fed. R. App. P. 24. Petitioner having failed to make a substantial showing of the denial of a constitutional right, a certificate of appealability **SHALL NOT ISSUE**. 28 U.S.C. § 2253; Fed. R. App. P. 22(b).

SO ORDERED this 19th day of April, 2017.

/s/ Harry S. Mattice, Jr.
HARRY S. MATTICE, JR.
UNITED STATES DISTRICT JUDGE